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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 2 Original.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

MEMORANDUM FOR SPECIAL MASTER.

C. E. LITTLEFIELD,
Special Master.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 3, Original.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

MEMORANDUM FOR THE SPECIAL MASTER.

I.

The Rule Under Which the Fees of the Special Master are Payable.

There does not appear to be any rule of the Supreme Court itself relating to this subject-matter.

The only rule that we find is Rule 82 of Rules of Practice in Equity in the courts of equity of the United States, which appears to relate to circuit courts only, and it is as follows:

> "82. The circuit courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge for the district, concurring in the appointment), and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the circuit court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if upon notice thereof he does not pay it within the time prescribed by the court."

This rule seems to vary the general common-law rule which entitled the master to hold his report until his fees are paid, and while this rule in terms applies to circuit courts only, under the authority of *Pennsylvania vs. Wheeling Bridge Co.,* 18 Howard, 461, where the court said:

> "We perceive nothing that should lead us to distinguish, on the question of costs, between this court and the circuit courts. And, as we have already said, the grounds for the exercise of the power—namely, the repeated recognition by acts of Congress of

> the right of the prevailing party to costs—is as applicable to the one court as the other,"

it would seem that Rule 82 was applicable to a proceeding in the Supreme Court of the United States in equity. If this be true, the "compensation" of the special master is to "be charged upon and borne by such of the parties in the cause as the court shall direct."

I submit that there is nothing in the facts in this case that would either justify or require the court to make an order otherwise than in accordance with what in the absence of the rule would be the legal rights of the parties.

II.

In the absence of the rule the plaintiff in this case is legally liable to pay the fees of the special master.

There is not much authority upon this question. Such as there is we quote to the court:

> "An arbitrator may recover compensation for his services without proving an express promise to pay. The defendant cannot object that the other parties to the submission should have been joined. This could only have been availed of by plea in abatement."
>
> *Hinman vs. Hapgood,* 1 Denio, 188.

In *Nealis vs. Meyer,* 47 N. Y. S., 156, an action was brought by a referee against the plaintiff in the case, and in determining the question of liability the court said:

> "A referee or arbitrator may by a common-law action recover compensation for his services without proving an express promise to pay, for the obligation to compensate is implied from the beneficial nature of the services aided by the attendance of the parties from which their consent sufficiently appears."

In *Little vs. Lynch,* 99 N. Y., 112, the court also said:

> "Upon filing the report the referee may doubtless maintain an action for his fees. The acceptance of a reference is a voluntary act, and the referee may decline the reference, but if he accepts it must rely for the payment of his fees upon the interest of the prevailing party to take up the report, and if he omits to do this upon his common-law action to recover them after putting himself in a position to maintain it by filing the report."

Upon these authorities I submit that it is clear that the moving party who utilizes the report made by the master becomes by necessary implication of law legally liable to pay the master his fees therefor.

In this case very clearly the moving party is the plaintiff, and the plaintiff by utilizing the re-

port made by the master has succeeded in getting a decree from the court showing a liability for the principal sum upon the part of the defendant of the amount of $7,182,507.46.

The plaintiff has received the benefit of the services and has utilized them with the knowledge of the responsibilities connected therewith. I submit that there is nothing in the case that would justify the court in making an order other than one that would follow and carry out the legal rights of the parties which would exist independent of the rule.

III.

Nothing appears in this case to justify applying any different rule to the fees of the master than have been heretofore applied by the court with the consent of all parties concerned to other items which are of the same degree and of the same character and equally make up the total of costs of the case.

In a requisition made by the special master, April 7, 1910, for the payment of costs and expenses in the execution of the rule, among other items there were:

Printing	$2,369.10
Accountants' services	1,040.83
Stenographers' services	8,652.33
Expenses of the special master	335.25

I submit with great confidence that there is no reason why these items should have received

preferential treatment by requiring the plaintiff to deposit in court the sums of money necessary to pay them and receive prompt payment, as distinguished from the fees due the special master. The printing bill, the accountants' charges and the stenographers' bill would have been of no use to the parties to the case except for the work performed by the master, for which his fees have already been fixed. No good reason appears in the brief submitted by the plaintiff why these items should be paid by the plaintiff and paid promptly, and the payment of the fees of the special master postponed and discriminated against and ordered to be paid at some time within its discretion by the defendant. It is also submitted that the expenses of the special master, $335.25, are entitled to no more preferential treatment in the matter of promptness of payment than are the services rendered by the master.

IV.

The special master is an officer of the court and in the order for the payment of his fees should not be subjected to any further delay, which would necessarily result if the fees are ordered to be paid by the defendant.

It is submitted that the fee allowed by the court was due the master at the time his report was filed. This was March 17, 1910. By its non-payment at that time the special master has already lost in interest something like $2,400. Nearly a year of the

delay in the fixing of the fee of the special master was caused by the objections filed by the Attorney-General for West Virginia on May 4, 1911. in which he suggested, in substance, that if West Virginia was not to pay any part of the master's fee they would have no interest in the amount that might be allowed, but did desire to be heard in case any portion of the fee would be ultimately paid by them. This resulted in a delay of nearly a year at an expense to the special master of nearly $1,200. When the matter was finally determined the Attorney-General of West Virginia withdrew these suggestions by submitting the matter to the discretion of the court without making any suggestions in relation to the amount. He did call the attention of the court to the fact that no money could be paid by West Virginia under its Constitution except by virtue of an appropriation having been previously made therefor, and that no sum was available for the payment of the special master's fee. The result of this is that if the court should direct the defendant to pay its portion of the total bill of costs represented by the fee of the special master, it would delay the payment until some time in 1913, when the legislature of West Virginia next meets, and would then be contingent upon whether or not the legislature thought fit to appropriate a sum necessary therefor. This would penalize the special master to the extent of nearly $1,200 more in delay, by loss of interest during that period of time, and the special master

begs leave to submit that there is nothing in the case that requires the court to thus penalize the special master in connection with the payment of his fee.

It is also submitted that the remedy of the special master, under the rule above referred to, in case an order is made requiring West Virginia to pay, may prove to be entirely inadequate. The only remedy provided under the rule, if the compensation was not paid by the defendant, in case the court so ordered, is the provision that—

> "he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if upon notice thereof, he does not pay it within the time prescribed by the court."

The special master begs leave to submit that it is extremely doubtful as to the efficacy of an attachment against a State for the failure to comply with such an order.

V.

No precedent or justification exists for determining at this time that a portion of the costs should be paid either in full or in part by the defendant.

As to how the matter of costs may be finally adjusted between the plaintiff and the defendant is a matter in which the special master has no concern and his rights and interests should not be involved in any controversy between the plaintiff

and the defendant upon a matter of that character. The only suggestion he has to make upon this branch of the case is that it seems to him to be entirely unprecedented to take up one item making up a total bill of costs and pass upon that one in determining whether or not as between the plaintiff and the defendant it is to be paid by one or the other, and remitting the special master for his remedy to the particular party to the suit that the court may thus determine it ultimately, as a part of the costs as between the plaintiff and the defendant, to pay the same.

C. E. LITTLEFIELD,
Special Master.